No. 11,651

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SUZANNE FITZGERALD FAWCETT, GERALDINE FITZGERALD CALLAGHAN, GERALDINE FITZGERALD CALLAGHAN, as Executrix of the Last Will and Testament of Gerald FitzGerald, Deceased, and EDWARD F. TREADWELL, Administrator of the Estate of Lillian Ryan FitzGerald, Deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLANTS.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT AS TO JURISDICTION.

This action is to recover certain taxes imposed by the Commissioner of Internal Revenue of the type held unauthorized by the Supreme Court in *Maass v. Higgins,* 312 U.S. 443, 85 L. Ed. 940. The action was brought against the United States pursuant to the

provisions of Section 24(20) of the Judicial Code as amended (28 U.S.C. 41(20)) because of the fact that the Collector was deceased. (R., p. 3.) The suit was brought in the names of distributees of the estate, as the administrator who had paid the tax had been discharged. (*Mertens,* Volume X, Section 58.07.) Judgment was rendered in favor of defendant on April 14, 1947. (R., pp. 25-26.) Notice of appeal was filed April 17, 1947. (R., p. 26.) Appeal to this Court is authorized by 28 U.S.C.A. 225 a (First).

STATEMENT OF THE CASE.

The tax here imposed was a tax purporting to be an estate tax, but being in fact a tax upon dividends paid on corporate stock of the estate of Lillian Ryan FitzGerald, which dividends were declared after the date of her death. (R., p. 4, par. VIII; p. 21, pars. VII and VIII). This type of exaction was held illegal in *Maass v. Higgins,* 312 U.S. 443, 85 L. Ed. 940. The tax was paid on the 12th day of January, 1942. (R., p. 22, par. IX.) Within four years thereafter and on November 16, 1945, a claim for refund of the tax was duly presented to the Commissioner. (R., p. 23, par. XI.) The sole question involved in the case is whether the matter is governed by the four-year statute embodied in 26 U.S.C.A., Section 3313, or the three-year statute embodied in 26 U.S.C.A., Section 910. (R., p. 30.) The trial Court held that the latter statute governed and that presentation of the claim was too late and gave judgment

for defendant accordingly. The judge wrote an opinion which is not reported. (R., pp. 16-19.)

Section 3313 relied upon by us reads as follows:

> "Sec. 3313. Period of limitation upon refunds and credits.
>
> All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive, or in any manner wrongfully collected must, *except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes,* be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund." (Italics added.)

Section 910 relied upon by the government reads as follows:

> "Sec. 910. Period of limitation for filing claims.
>
> All claims for the refunding of the tax *imposed by this subchapter* alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immedi-

> ately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund." (Italics added.)

ARGUMENT.

This question can be narrowed down to this proposition: The matter is clearly covered by the four-year statute, Section 3313, unless the exaction was an "estate" tax and was "imposed by" the subchapter of the Internal Revenue Act dealing with estate taxes. The correctness of our position in this regard that the tax is not such a tax so imposed is sustained by the District Court and the Circuit Court of Appeals of the Sixth Circuit in the case of *In re Tindle's Estate,* 59 F. Supp. 667, 152 F. (2d) 757. In arriving at the conclusion that the tax was not "imposed by this subchapter" within the meaning of Section 910, the Court said:

> "The refund was rather for a refund sought to be imposed as an estate tax, but held by the Supreme Court not to have been levied at all under the statute in question."

The correctness of this is shown by the fact that it was pointed out by the Supreme Court in *Maass v. Higgins,* 312 U.S. 443, that the tax was imposed under an invalid regulation in no way authorized by the chapter in question.

Moreover, by a long line of decisions the courts have strictly limited the three-year statutes which

have been relied upon by the government to deprive the taxpayer of his remedy under the four-year statute. In the cases of *Jones v. Liberty Glass Company,* 66 F. Supp. 254, affirmed by the Circuit Court of Appeals of the Tenth Circuit, —— F. (2d) ——,* January 21, 1947, *Noble v. Kavanagh,* 66 F. Supp. 258, affirmed by the Circuit Court of Appeals of the Sixth Circuit, —— F. (2d) ——,* February 11, 1947, *Huntley v. Southern Oregon Sales, Inc.,* 102 F. (2d) 538, Ninth Circuit, and *U. S. v. Lederer Terminal Warehouse Co.,* 139 F. (2d) 679, the government attempted to apply 26 U.S.C.A. 322 (a)(1)(b)(1), which reads as follows:

> "Where there has been an overpayment of any tax imposed by this chapter the amount of such overpayment shall be credited against any income * * * and any balance shall be refunded immediately to the taxpayer * * *"

and provided for a claim for refund within three years.

In all of those cases the courts held that an outright illegal exaction not authorized by the law was not "an overpayment of any tax imposed by this chapter" and that the matter could not be brought within the three-year statute.

It is true that there is a difference between Section 322 and Section 910 for the reason that the former refers to "an overpayment of any tax imposed by this chapter," while the latter refers to "any tax im-

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*Pending on *certiorari* in Supreme Court.

posed by this subchapter." We will refer to that matter later, but at the present time it should be noted at all events that certain principles lie at the basis of those decisions which are generally applicable here. These are the following:

(1). In those cases, as well as in this case, the plaintiffs relied on Section 3313, which contained the language: "except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes." Notwithstanding that provision it was held that the statute was applicable to taxes purporting to be assessed under the law relating to those types of taxes, if the assessment had the characteristic of a tax erroneously and illegally assessed without authority of law rather than a mere over-assessment of a tax authorized by those statutes. All of those cases involved income or excess-profits taxes.

(2). In these cases the plaintiffs relied on Section 3313 which was the most general provision of law regarding refund of taxes, whereas the Government relied on Section 322, which was a much later enactment, and one that was special and therefore subject to the general rule that a later special statute applicable to one particular thing is generally deemed to supersede a general statute on the same subject. Notwithstanding this rule, the courts held that the general statute, and not the special statute, prevailed.

(3). These cases also held that the special statute relied upon by the Government should be limited strictly by its terms, and should not be held to be irreconcilable with the general statute. We think it

clear that if Section 322 had been the only statute applicable to refund of income taxes, it would have been held that any tax which was not authorized would be included in the word "overpayment," and could be refunded under that statute and would have been governed thereby. But it was in view of the fact that there was a general statute allowing the four years which should be given full effect except as clearly superseded by the special statute. The courts therefore worked out the distinction between a tax not imposed by the statute and a tax imposed by the statute which had been over-assessed.

The case of *Godfrey v. U. S.*, 61 F. Supp. 240, was one involving a gift tax which was based on a new regulation by the Treasury Department attempted to be retroactively applied. In that case the Government relied upon 26 U.S.C.A., Section 1027, which read:

> "Where there has been an *overpayment of any tax imposed by this chapter,* the amount of such overpayment shall be credited against any gift tax then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer."

and required a claim for refund within three years, while the plaintiffs in that case, like the plaintiffs in this case, relied upon and were held entitled to rely upon, Section 3313. In reaching that conclusion the Court pointed out that the tax attempted to be justified retroactively by a regulation not in force at the time of the assessment, was a tax clearly within the four-year statute, and not within the statute relating to "an overpayment of any tax imposed by this chapter."

In the case of *Jones v. Liberty Glass Company,* supra, the court said:

> "Another well recognized rule lends its strength to the conclusion that the time for the filing of a claim of this kind is governed by section 3313, not section 322. The case of *Huntley v. Southern Oregon Sales, Inc.,* supra, was decided almost eight years ago, and the later cases citing it with approval and reaching the same conclusion followed. During that period Congress convened from time to time, enacted revenue legislation, and by section 5 of the Act of July 31, 1945, 59 Stat. 511, 523, amended section 322, all without indicating in any manner its disapproval of the judicial interpretation placed upon the two sections. That in composite effect should be regarded as Congressional approval and adoption of the interpretation placed by the courts upon the two statutes. *Sessions v. Romadka*, 145 U.S. 29; *Manhattan Properties, Inc. v. Irving Trust Co.,* 291 U.S. 320; *United States v. Elgin, Joliet & Eastern Railway Co.,* 298 U.S. 492; *Missouri v. Ross,* 299 U.S. 72; *Electric Storage Battery Co. v. Shimadzu,* 307 U.S. 5. True, none of the cases construing the two sections was by the Supreme Court of the United States, but the rule of uniform judicial construction of a statute over a long period of time being regarded as acceptable to the legislative arm of the government has appropriate application where legislation dealing with the general subject matter has been enacted and the particular statute has been amended, without any action or expression indicating legislative disapproval of the judicial construction, even though the construction was by

circuit courts of appeals and district courts of the United States. *Manhattan Properties, Inc. v. Irving Trust Co.,* supra."

This rule of strict construction of these special statutes relied upon to override a general statute authorizing a refund in four years, is directly applicable to this case. Here we have a direct statute authorizing a claim within four years. We have special statutes not providing that all claims for refund of income tax, excess-profits taxes, gift taxes, or estate taxes, shall be presented within three years, but that claims for overassessment of those taxes, or claims for the refund of taxes imposed by certain chapters, must be filed within three years. Over a long period of years the courts have sensed the injustice of defeating the taxpayer who has relied on the four-year statute, in view of the ambiguity of the three-year statute. Then a Circuit Court of Appeals in *In re Tindle's Estate,* supra, directly holds that the same rule is applicable to the statute as to estate taxes and that its operation should be likewise limited to overpayments of taxes imposed by the statute dealing with gift taxes, and should not be extended to taxes which are not imposed by that statute. The failure of the Government to ask for a review of the decision in the *Tindle* case by the Supreme Court of the United States is strong evidence that the Government was satisfied with the decision and that it might be safely relied upon by the profession. The Government had contested every one of these cases above reviewed, and, as stated in the opinion in the *Tindle*

case, "The Commissioner contends that these decisions are all unsound and should not be followed." In that case the Government argued that if they were not overthrown the tax in question should be held to be an overpayment within the meaning of those decisions, which was an interpretation of the language of the present Act, "imposed by this subchapter," as limiting that Act to overpayments of taxes authorized by that chapter.

Obviously the mere fact that the Commissioner, in assessing a tax purports to act under the estate tax statute, does not make the tax when assessed one "imposed by this subchapter." The assessment involved here was a tax on a dividend declared and received after the death of the decedent. The estate tax is a tax on property passing at death. The sub-chapter in question does not impose any taxes on dividends declared and received upon stock after the death of the decedent. This particular assessment was held to have not been imposed under the Act, but imposed under regulations which were unauthorized by the Act. *(Maass v. Higgins,* 312 U.S. 443.) This exaction could just as well, and in fact more properly, have been called "a dividend tax," or "an income tax" or "a capital stock tax," or "an excise tax," or any other type of tax rather than "an estate tax." It was simply an unauthorized exaction having its origin in the invalid regulations of the Internal Revenue Department and having no statutory basis whatever. It was not therefore a tax "imposed by this subchapter," and does not come within the terms of Section 910.

There are other reasons why Section 910 should not be construed to extend to all taxes purporting to be assessed under the estate tax statute. When the Congress wanted to except all income taxes from the operation of any statute, it had no difficulty in saying so. For instance, it was desired that Section 3312 should apply to the assessment of all internal revenue taxes, and it therefore provided:

> "*All* internal revenue taxes shall (except as provided in subsections (b), (c), and (d)) be assessed within four years" etc.

The same all-embracing language is used in Section 3313:

> "All claims for the refunding * * * of any internal revenue tax alleged to have been erroneously or illegally * * * collected * * * must, except as otherwise provided by law in the case of income * * * taxes, be presented * * * within four years next after the payment of such tax * * *".

If Congress had meant to except not only those cases provided for by certain sections, and afterwards changed to the more embracing term "law," but all refunds of income etc. taxes, it could have easily done so by saying "except in the case of income etc. taxes," just as was done in Section 3312; but it did not use that language, but limited the statute to a tax "imposed by this chapter," and in the case of gift tax to "taxes imposed by this subchapter." The question is not whether Congress used the word "overpayment" or not, the real question being whether the col-

lection was of a tax imposed by the particular chapter or subchapter of the Revenue Act referred to, or a collection not authorized by any law. The real distinction is the distinction between a lawfully imposed tax and one not imposed by law. It is for this reason that the Circuit Courts of Appeals of the Second, Third, Sixth, Ninth and Tenth Circuits have insisted upon a strict limitation of the special statute relied upon by the Government and the applicability in cases of this kind of the general four-year statute.

His Honor Judge Roche, in deciding the case at bar, placed great weight on the fact that in the case of *Rosenman v. United States*, 323 U.S. 658, the Court quoted Section 910 as the statute applicable to claims for refund of taxes imposed by the estate tax statute. However, in that case there was no question raised as to whether that statute or the four-year statute was applicable. As a matter of fact, in that case the claim for refund was made within three years after the tax was paid, and therefore there was no question raised or involved as to which statute was applicable. The only question actually involved in the case was the erroneous claim made by the Government that the tax was actually paid many years before it was credited on the tax when a deposit was made on account of the tax. This contention of the Government was held to be unfounded, and it was held therefore that the claim for refund was timely even under the three-year statute. The Court had no occasion whatever to pass on the four-year statute, and its mere reference to the three-year statute cannot be

deemed to be a decision on the question here involved. Moreover, that case involved merely an overpayment of the tax due to the disallowance of certain deductions and not to a totally illegal exaction, and was one therefore that was properly referred to as being governed by Section 910.

We respectfully submit that this tax was of a character clearly covered by Section 3313 and is not of a character covered by Section 910; that plaintiffs relied and were entitled to rely on the decision in *In re Tindle's Estate,* and that the claim for refund was seasonably made and that the judgment should be reversed.

Dated, San Francisco, California,
July 14, 1947.

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